

## United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Wayne R. Andersen	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	96 C 6797	DATE	9/27/2002
CASE TITLE	Dalmanic A. Simmons vs. John Ellena et al		


[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

## MOTION:

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## DOCKET ENTRY:

(1)	<input type="checkbox"/>	Filed motion of [ use listing in "Motion" box above.]
(2)	<input type="checkbox"/>	Brief in support of motion due _____.
(3)	<input type="checkbox"/>	Answer brief to motion due _____. Reply to answer brief due _____.
(4)	<input type="checkbox"/>	Ruling/Hearing on _____ set for _____ at _____.
(5)	<input type="checkbox"/>	Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(6)	<input type="checkbox"/>	Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(7)	<input type="checkbox"/>	Trial[set for/re-set for] on _____ at _____.
(8)	<input type="checkbox"/>	[Bench/Jury trial] [Hearing] held/continued to _____ at _____.
(9)	<input type="checkbox"/>	This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to] <input type="checkbox"/> FRCP4(m) <input type="checkbox"/> Local Rule 41.1 <input type="checkbox"/> FRCP41(a)(1) <input type="checkbox"/> FRCP41(a)(2).
(10)	<input checked="" type="checkbox"/>	[Other docket entry] <b>Enter MEMORANDUM, OPINION AND ORDER: We deny the summary judgment motion of defendants John Ellena, Symeon Brown, George Vickers, Darla Michel, Nicole Watkins, Anthony Robinson, Thomas Snyder, Duane Neff and Michael Appleton [154-1]</b>
(11)	<input checked="" type="checkbox"/>	[For further detail see order attached to the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input checked="" type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	TSA 	courtroom deputy's initials	Date/time received in central Clerk's Office	number of notices	Document Number  <div style="font-size: 2em; font-family: cursive;">167</div>
				<div style="border: 1px solid black; padding: 2px;">             SEP 30 2002  <small>date docketed</small> </div>	
				<div style="border: 1px solid black; padding: 2px;">             G.Y.  <small>docketing deputy initials</small> </div>	
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				<div style="border: 1px solid black; padding: 2px;">   <small>mailing deputy initials</small> </div>	

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Robinson, Snyder, Neff, and Appleton failed to intervene on July 13, 1996 and August 18, 1996 and that such failure constitutes a deliberate indifference to Plaintiff's safety and well being. Count III alleges that Defendants Ellena, Brown, Vickers, Robinson, Snyder, Neff and Appleton conspired to use excessive force against Plaintiff on August 18, 1996.

Defendants have filed answers and affirmative defenses to Plaintiff's Complaint, First Amended Complaint, and Second Amended Complaint. However, in their three Answers, Defendants did not raise the defense of Plaintiff's failure to exhaust administrative remedies. Now, approximately six years after Plaintiff filed his original Complaint and months prior to trial, Defendants have filed a Motion for Summary Judgment requesting judgment in their favor because Plaintiff failed to exhaust his administrative remedies regarding the July 13, 1996 incident ("July Incident").

#### **DISCUSSION**

A party is entitled to summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The Court will not render summary judgment if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The mere possibility of a factual dispute is not enough to defeat a summary judgment motion. *Id.* 250; *Waidridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994).

Defendants argue that they are entitled to summary judgment because Plaintiff failed to exhaust his administrative remedies, as required by the Prison Litigation Reform Act ("PLRA"), 28 U.S.C., Section 1997(e). This argument is rejected because Defendants waived the defense.

The Federal Rules of Civil Procedure require Defendants to plead affirmative defenses in response to a preceding pleading. Fed.R.Civ.P.8(c). The purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and an opportunity to contest it. *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 2000), citing *Blonder-Tongue Labs. v. Univ. Of Illinois Found.*, 402 U.S. 313, 350, 91 S.Ct. 1434 (1971). The Seventh Circuit has treated the failure to raise affirmative defenses in a responsive pleading as a waiver of those defenses. *MCI Telecommunications Corporation v. Amen-Tel*, 852 F.Supp. 659, 666 (N.D.Ill. 1994), citing *Bank Leumi Le-Israel. B.M. v. Lee*, 928 F.2d 232, 235 (7th Cir. 1991). Therefore, the Court need not consider an affirmative defense raised for the first time in a Motion for Summary Judgment. *Telecommunications Corporation*, 852 F.Supp. at 666 (failure to plead affirmative defenses of estoppel and illegality until responding to summary judgment motion constitutes waiver of that defense).

A prisoner's failure to exhaust administrative remedies before filing a claim constitutes an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *Massey*, 196 F. 3d at 735. Because failure to exhaust administrative remedies is an affirmative defense, Defendants have the burden of pleading and proving the defense. *Id.*

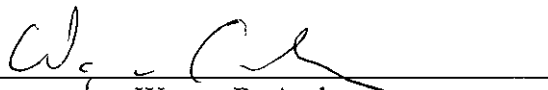
In this case, Defendants' Answers to Plaintiff's Complaint, First Amended Complaint and Second Amended Complaint do not mention Plaintiff's failure to exhaust his administrative remedies. Therefore, the defense is waived by Defendants. Moreover, the untimeliness of the defense greatly prejudices Plaintiff who has spent years pursuing his claim without notice of this particular defense. Almost six years has passed since Plaintiff filed his original Complaint, voluminous and costly discovery has taken place, and a trial date is scheduled.

For all of the foregoing reasons, Defendants' motion for summary judgment is denied.

**CONCLUSION**

For the foregoing reasons, we deny the summary judgment motion of Defendants John Ellena, Symeon Brown, George Vickers, Darla Michel, Nicole Watkins, Anthony Robinson, Thomas Snyder, Duane Neff and Michael Appleton (# 154-1).

It is so ordered.

  
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Wayne R. Andersen  
United States District Court

Dated: September 30, 2002